deposition. Does that refresh your recollection, Mr. Bird, as to the date your deposition was taken?

A. It indicates it was -- it was April 30.

Q. Okay. And you testified this morning that you have not -- you've never engaged the services of a -- of a realtor to sell this property. Is that right? The subject property I'm speaking.

A. We have not sought employment of a realtor, no.

Q. Okay. And isn't it true that one of the reasons that you did not take any action to sell this property was because it might affect the right of rescission? Isn't that -- the rescission claim in the adversary proceeding. Isn't that true?

A. That's correct.

Q. And isn't it true that as of April of this year, you considered the rescission claim to be at the very heart of the lawsuit?

A. No. That's not true.

Q. Mr. Bird, I call your attention to the bottom of page 12 of your deposition beginning at line 25, the question posed to you:

"Q What, in your mind, would have prohibited the sale of the property in the meantime?

"A Well, one of the problems is that the selling the property -- there's an argument, as I understand it, that the rescission rights that are at the heart of the lawsuit would be lost upon the sale of the property."

You testified in your deposition, did you not, that those rescission rights are at the heart of the lawsuit? Isn't that true?

A. I said that.

Q. Okay. And this was in April of 2000 -- end of April of 2009?

A. Right.

Q. Okay. You were represented at that deposition by Mr. Affleck, were you not?

A. I was.

Q. Isn't it true that you testified at your deposition about how a rescission might take place? Isn't that true?

A. I was asked questions about that. Correct.

Q. You don't recall testifying about -- about how that rescission might take place?

A. Well, as you'll recall in the deposition, I indicated that I was leaving those legal issues and strategy to my litigation counsel, but I was asked questions about that, and I responded to them.

Q. I call your attention to page 20 of your

deposition beginning on line 3, the first complete sentence.
A. All right.
Q. I'm asking how the Bankruptcy Estate would intend to rescind. See that?
A. We're on page 20?
Q. Correct. I'm asking how the Bankruptcy Estate would intend to rescind. I'm reading from lines 3 and 4. Do you see that?
A. Okay.
Q. And your response was, "Once we come to that issue, we'll deal with it." Is that correct?
A. That's what I said.
Q. And then I said, "How would you deal with it?" And then you said, "Well, I suppose there are several ways that that could happen. One is that the property could be sold and Winterfox could be paid. Another possibility is the property could be refinanced by someone who has an interest in the property, and Winterfox's lien could be satisfied." That was your testimony, was it not?
A. That's what I said.
MR. JUBBER: I have nothing further, Your Honor.
MR. AFFLECK: No questions.
THE COURT: All right. You may step down.
MS. BOULEY: Your Honor, at this time, could we read in our portions of the Kalix deposition into the record?

THE COURT: All right.

MS. BOULEY: All right. And we have another attorney from our office, Rob Crockett, who is going to sit in for Mr. Telford, if that's okay.

THE COURT: All right.

MS. BOULEY: We'll start on page 13, line 25.

"Q Did you receive training during the course of your time as a technical support rep to be able to provide those services?

"A I did not.

"Q How did you gain the understanding as to how to troubleshoot this Kalix Point software then?

"A Self taught.

"Q Did you say self taught?

"A Yes. I taught myself."

MS. BOULEY: And then page 57, line 14.

"Q Okay. So I just want to understand that your testimony today is that it is not possible to print the disclosure notice, including the Truth In Lending disclosure statement and the Good Faith Estimate, without a date. Is that correct?

"A That's not correct. So I verified that it is possible for that to happen subsequent to this e-mail.

"Q Okay. So that statement -- your testimony is that that state -- that that statement, that response in this e-mail that it's not possible to print the forms without a date, that's not a correct statement?

"A That's not a correct statement. Correct. It is possible. If you delete the date and you print the form, it will print blank.

"Q And that's been true for every version of the software?

"A Correct.

"Q Was there some -- was there a reason for which you did not correct the statement in this e-mail when Mr. Weinberg provided it to you?

"A I didn't read it closely enough. I wasn't paying attention to the specifics of the response when he wrote it."

MS. BOULEY: And then at page 64, line 11.

"Q Is it possible for the users to delete the Kalix Point software footer?

"A No. That's not possible. Although, there is an instance where on certain printers it may cut off because of the margin settings on certain printers. I mean, there's hundreds of printers out there, and it is possible that it could cut off. But the user can cannot do anything to affect it."

MS. BOULEY: And page 66, line 6.

"Q Has there ever been a Beta released more than six to eight weeks prior to the software release date?

"A There was one time. It was at a time when we were making a major change to the internal code transitioning from 16-bit software to 30-bit software, and we sent out a preview release. It was really a Beta version, but we called it a preview release for marketing reasons, and we sent it out to approximately 1,000 users because this was such an architectural change in the software we wanted to get a lot of feedback.

"Q And how far in advance, when was that preview release sent to the thousand users?

"A That was sent approximately -- I don't know exactly, but I -- if I had to say approximately, it was about three months.

"Q And what month and year did that preview release get sent out?

"A I don't remember."

MS. BOULEY: Okay. Then page 67, line 1.

"Q Was it within the years of 2000 to 2005?

"A I believe. It was between those years. It was -- if I had to approximate, I think it was late 2001."

MS. BOULEY: Okay. Then page 74. I'm sorry. Actually, we're going to back up. Page -- the question starts on page 73, line 19.

"Q And why is it unlikely that it was omitted due to the user's print settings?

"A Because the rest of the form is there, and it's not very far away from the applicant signature line. And everything else is there on the form, so it's unlikely that it would have been omitted. And in those cases where it's been -- where information is omitted, it's -- the rest of the form on the top margin could also be incorrect, so I think it's unlikely that it's a print margin issue. Although, I will say because this has been shrunken to a letter size, it's not the best representation, and it would be better if it was a legal size document as it was originally printed out as."

MS. BOULEY: Then page 81, line 19.

"Q Let's take a look at Exhibit -- before we do that, at the bottom -- do you see a Kalix footer at the bottom of this Exhibit 1-2?

"A I do not, no.

"Q Does it appear that the reasons for this" -- I'm sorry. "Does it appear that the reason for this omission is the users's print settings?"

"MS. BOULEY: Objection. Foundation.

"MR. HERNS: Calls for speculation.

"THE WITNESS: I can't tell. It's not possible To tell."

MS. BOULEY: And that's, again, top of page 82, lines 1 through 3. Then skip down to line 9 on page 82.

"Q Is there any reason why the Kalix footer could be omitted from this document other than the users's print settings?

"MS. BOULEY: Objection. Foundation.

"MR. HERNS: Calls for speculation.

"THE WITNESS: I don't know."

MS. BOULEY: Okay. Then page 87, line -- line 10.

"Q Is there a footer on Exhibit 1-3?

"A There is, but it looks -- it appears to be cut off. I couldn't speculate as to why, but it does appear to be partially cut off the bottom left."

MS. BOULEY: Okay. Then page 112, line 10.

"Q The first question I have is how many versions of the Kalix software have there been?
"A There's been quite a few.
"Q Do you know how many?
"A There's probably been about 50 versions. That's an approximation.
"Q Is that between 1991 and 2008?
"A Yes.
"Q Okay. Do you know how many versions there were between, say, 2000 and 2005?
"A Yes. There were about 17, 18 versions.
"Q And do you know how many other software companies there are that duplicate the Kalix forms or have forms that are very similar to Kalix forms?
"A Could you rephrase the question.
"Q Yes. You indicated earlier that there are" --
Now on page 113, line 1.
-- "other companies that attempt to duplicate or use very similar forms to the forms that Kalix uses. I'm wondering if you know how many such companies there are.
"A Well, there are a number of software competitors in our field and, you know, there --

there's, roughly, ten competitors that I know of that have the same functions as the Point software that also produce the same forms that are required for loans."

MS. BOULEY: Okay. Then on page 114, line 5.

"Q Then you also have been asked today about why the footers may not -- are not appearing on some of these Kalix forms in Exhibit 1 that's before you. I'm wondering if you know how many times or how many copies removed from the original is the copy of Exhibit 1 that's before you.

"MR. HERNS: Calls for speculation.

"THE WITNESS: I have no idea."

MS. BOULEY: Okay. Then skipping down to line 15.

"Q Okay. Do you know what -- and these documents that we've been talking about in Exhibit 1 that don't have the Kalix footer on them, do you know what type of printers those documents were printed on?

"A No idea.

"Q I'm sorry. Was that 'no idea?'

"A I have no idea. Could be -- there's hundreds of printers. It's impossible to say."

MS. BOULEY: Okay. Then over on page 116, line 16.

"Q Is it possible that the Kalix footer

could have been cut off during the copying phase
of this document, the document that's before you?
"A Yes. It's possible that it could have
been cut off during the copying phase or possible
that it was obscured by other information; stamps
or papers on the bottom of the form that printed
the exhibit number.
"Q Okay. The bottom line is you just
really don't know why the footer isn't there.
Correct?
"A Exact" --

MS. BOULEY: And then it's -- I'm sorry. Page 117, line 1.

"A Exactly. I do not know."

MS. BOULEY: Okay. That's all, Your Honor. That's all, Your Honor.

THE COURT: All right. Thank you. Is there anything else that needs to be added to the record through this deposition?

MR. MILLAR: Just two questions, Your Honor.

THE COURT: All right.

MR. MILLAR: From the deposition transcript. My question will come from page 67. Question, at line 5 on page 67.

"Q Could it have been in 2003?

"A No. Could not have been.
"Q So could not have been subsequent to 2003 that this preview release was sent out?
"A That is correct."

MR. MILLAR: No further questions, Your Honor.

THE COURT: Anything further in regard to the deposition? All right.

MS. BOULEY: No, your Honor. Your Honor, Winterfox calls David Luna.

THE COURT: Sir, would you come forward and be sworn, please.

(The witness is sworn.)

THE CLERK: Please take the witness stand, and state your name and spell it.

THE WITNESS: My name is David Luna spelled D-a-v-i-d, last name is L-u-n-a.

DIRECT EXAMINATION +

BY MS. BOULEY:

Q. Okay, Mr. Luna. You've been retained by Winterfox as an expert witness to provide certain opinions in this case. Is that correct?

A. That is correct.

Q. What issues were you asked to address?

A. Whether terms and conditions of any loan available to Mr. Kitts or Sun Peak Holdings would have varied significantly from those set forth in the loan documents executed in favor of Winterfox, if, in December of '04, Mr. Kitts could have received a loan at a traditional prime conventional sub-prime interest rate, or whether the terms and conditions of the Winterfox loan to Kitts in December '04 were reasonable and competitive based upon the risk associated with the extension of credit.

Q. And could you please turn in the witness book there to Exhibit 522.

Your Honor, may I approach to help him find that?

THE COURT: You may.

Q. (BY MS. BOULEY) Do you recognize Exhibit 522?

A. Yes, I do.

Q. And what is that?

A. It is my expert witness report.

Q. Okay. And is that your signature on page, I believe it's 10 of the report?

A. That is my signature.

Q. Can you briefly describe for the Court your knowledge, skill, experience and credentials that you have that relate to the issues you've just described.

A. I began in the mortgage lending field in 1980 working for Mellon Bank in Los Angeles, California. I came up to go to school, worked for Zions Bank and an industrial bank, Lockhart Company, from '80 to '84. Returned back to

Southern California, worked for Great Western Savings, moved back to Utah, worked for a federal credit union.

I've been in the mortgage industry for approximately 30 years. I've originated over 6,000 loans totaling approximately a billion dollars. I've -- I have experience with almost all loan types; conventional, conforming, nonconforming, government, sub-prime, hard-money, FHAVA, USDA.

Q. All right. Thank you. Do you have experience and are you familiar with the criteria and standards used in the lending industry to determine whether a prospective borrower qualifies for a loan with a conventional or sub-prime interest rate?

A. I do. I've been trained not only in the banking savings and loan and mortgage industry, but I was also asked by the governor of Utah to be the regulator over residential mortgage regulatory compliance so I would need to know whether other individuals were acting within the guidelines that was set forth.

Q. Do you have experience and are you familiar with the criteria and standards used in the lending industry to determine whether a prospective borrower qualifies for a private-money loan?

A. Yes, ma'am.

Q. And can you describe for the Court what that experience is.

A. Generally speaking, most loans will fall into three criteria. Stability, ability and willingness. Stability is having a lender -- having a borrower move around a lot, whether it be in employment or income, makes a lender nervous. Ability, does the individual have the means by which to repay the loan, and willingness, have they shown in the past the ability to meet their obligations.

Q. And you have experience with private-money loans?

A. Yes, ma'am.

Q. Okay. And what is that experience?

A. Over almost a 30-year history, we've done not only conventional sub-prime, but, also, hard-money loans as well. We've done many of them.

THE COURT: I'm sorry, sir. That -- that's not helpful. I don't know who "we" is. Who are you referring to when you say, "We?"

THE WITNESS: Thank you. I have been an owner of multiple mortgage companies, and so it was either myself personally or as the supervisory individual over loan officers underneath my stewardship.

Q. (BY MS. BOULEY) Okay. And do you have experience and are you familiar with what interest rate and points would be available from a sub-prime or hard-money lender?

A. The more risk involved in a loan would require a higher degree of interest, so higher the risk, higher the rate. Unfortunately, say in the 1980s, there was a term that was used in Southern California of 15 and 15. 15 percent and 15 points. In the mid '80s when loans were a little more plentiful and interest rates a little more competitive, the interest rates would have been lower. The points to generate those loans would have been lower because of the competitive nature of the market.

Q. Okay. And what -- what experience do you have with determining interest rates or points in connection with sub-prime or hard-money loans?

A. Again, the greater degree of risk would determine the higher interest rate. So, for example, a prime loan --

THE COURT: I'm sorry, sir.

MS. BOULEY: Oh. Sorry.

THE COURT: Will you listen to the question that she's asking, because you're answering something else.

THE WITNESS: My apology.

THE COURT: So if you -- if you can restate your question and, perhaps, the witness can listen and give a little more related answer.

THE WITNESS: Thank you.

MS. BOULEY: Certainly.

Q. Mr. Luna, I'm wondering if you can tell the Court or explain to the Court what experience you have, what expertise, experience you -- you bring that -- that allows you to -- or that educates your opinion in terms of what interest rate or points would be available to a borrower for a sub-prime or a hard-money loan.

A. In the years in question? From '04 to '05?

Q. Yes. Yes. We'd like to know what, in your professional experience, you know, informs you as to what interest rates or points would be available.

A. If I recall correctly, approximately 8 to 10 percent was the --

Q. I'm sorry, Mr. Luna. Again, I'm asking about your credentials.

A. Oh.

Q. Your experience, your credentials. What -- what have you done in your background that gives you expertise in this area that allows you to --

A. I made those loans. I worked with the lenders that would make those loans. I worked with many, many lenders. Would you like me to list names of some lenders?

Q. Certainly.

A. Countrywide, Accredited, New Century, First Franklin. Egis, Argent, Aurora, Mela, Home 123. We -- I worked with these companies directly, and I knew their underwriting criteria, their loan-to-values, their credit scores, their ratios, and we would determine whether the loan qualified to meet either a traditional loan, a government loan, a sub-prime loan, or -- or other kinds of loans.

Q. And could you please turn in your witness book to Exhibit 523.

A. Yes, ma'am.

Q. Do you recognize that document?

A. It is my rebuttal report to the expert witness report of Mr. Haertel.

Q. And is that your signature on page 3?

A. It is.

Q. Mr. Luna, can you tell us what you reviewed to form your opinions in this case.

A. Yes. I reviewed the December 8th, 2004, Deed of Trust on Lot 25, Cedar Draw Estates. The December 31st, 2004, trust deed note in the amount of 39,603, the December 23rd, '04, Deed of Trust, Lot 25, Cedar Draw Estates, February 23rd, 2005, 1.389603.47 Addendum To Note. In short, page 4 and the top of page 5 of my original report.

Q. Did you review the rest of the things that are listed in your report in forming the opinions you're going to give today?

A. I did.

Q. And do you recall how many hours you spent reviewing and considering this information?

A. I would guesstimate that I spent about 10 hours reviewing all those documents.

Q. And what else besides the data and information identified in your report are you relying upon for the opinions you're prepared to render today in this case?

A. My almost 30 years' experience.

Q. So, Mr. Luna based, upon your review of the information outlined in your report, and as you've explained here today, have you formed an opinion on whether, in December of 2004, Brian Kitts could have received a loan at a conventional or sub-prime interest rate?

A. He could not.

Q. Okay. Before we get to that, can you tell me what information a lender of a conventional or sub-prime loan would require or consider before it could determine whether to make a loan in excess of $1.3 million, again, back in this time frame of late 2004?

A. Generally speaking, a lender would require a loan application, a credit report, an appraisal, title work, verification of employment, if there was any, tax returns, bank statements, paycheck stubs. They would really need to make a decision based on all the available information to determine whether they could or could not do a conventional loan. If some information was not available, there were also other programs such as Mr. Haertel mentioned. A no-income no-asset stated-income stated-asset type of a program.

However, if you are going to remove one of the three key variables in the stability, ability and willingness factors, meaning you are going to remove the ability or income, the other two need to be even stronger. So the credit score would have need to have been higher. You would have had to make the lender feel more comfortable in issuing this loan if you were not solely going to rely on income.

Q. Okay. And so how would the factors that you've just described be applied in the conventional loan industry in determining whether to make a conventional loan in excess of 1.3 million?

A. He would not have qualified for a conventional loan. A conventional loan -- there are two kinds of loans. Either a conventional loan or a government loan. Under government he would not -- absolutely not have applied -- qualified because there are no stated-income programs under government loans.

On a conventional loan sub-prime, he might have been able to qualify if his credit score was high enough. I did not have, in the documents that I reviewed, a copy of a credit report, so I cannot determine what his credit score was. However, I was supplied with bankruptcy paperwork of two different bankruptcy filings and a Notice of Default, and that alone would have greatly diminished a credit score, and it would not have been able to have been done conventionally or sub-prime. So you would look at hard money being about the only other option that would be available. The hard-money lender, ignoring income and maybe even ignoring or forgiving some credit blemishes. That would have been about the only option available.

Q. All right. Mr. Luna, what information would a -- since we're talking about the hard-money loans, what information would a hard-money lender require or consider before it could determine whether to make a loan in excess of 1.35 million? And I'd just like you to talk with us generally about what -- what things a hard-money lender would have been taking into consideration at the end of 2004. Again, for a loan of this size.

A. If they are forgiving credit blemishes, then -- or they're not really considering credit blemishes, they really would need to look at either income, the property, and probably a combination of both.

A hard-money lender would want to get their money back so they could lend it out over and over and over to get a return on their dollars; but if they had to sit with a -- with a loan outstanding of $1.3 million, that would certainly be a detriment to most hard-money lenders.

Q. Would it matter to a hard-money lender that the borrower had just come out of bankruptcy a few months earlier?

A. It would certainly be a consideration, yes. Having an individual come out of bankruptcy and then -- would have made any lender nervous. If someone had gone through two bankruptcies recently would make a lender extremely nervous, and then have a Notice of Default on top of that would have increased the risks, also increasing the interest rate.

In addition to the documents that I reviewed, I saw that taxes were not paid, and so there would be this history, this precedent that was set that the individual may not -- may not have been able to pay back the loan. This -- this loan that Winterfox granted is probably the only kind of loan Mr. Kitts could have received.

Q. What about the fact that there was equity in this property?

A. Equity --

Q. How does -- how does that factor into a hard-money lender's decision -- or how would that factor into a hard-money lender's decision in terms of whether to make a loan of this magnitude, the 1.3 million?

A. Equity is a relative term, meaning in my 30 years, I've seen interest rates go up and down. I've seen property values go up and down. He's -- the lender, Winterfox, is taking a gamble, a guess, that the value would still be there when it came time for the loan to be repaid. They would look at carrying charges, as was outlined earlier today, meaning interest, the benefit of not having the interest or principal return so they could turn around and lend the money to someone else. Realtor costs, if they had to list the property for sale. If there were foreclosure costs, attorney's fees, time lost. If they had to winterize the property or protect it from vandals. If they had to put a home this size, do they have to put a security guard out there. And then, also, the limited market of those individuals that could afford a 1.3, $1.52 million home is also limited here in Utah. Now, maybe in Southern California or Downtown New York that would be a little more easy, but for Utah, that would have been a little more difficult. A lot more difficult.

Q. All right. And so the fact that it -- that there's a risk that -- that the lender might not be able to -- might not get their money back and then might be faced with either foreclosing on the -- and then might be faced with foreclosing on the property and then not having a large pool of buyers who could qualify for a purchase of this magnitude, how -- how would that affect the availability of a private-money loan of 1.3 million? Again, back in this time frame.

A. I just don't know of anybody that would have done it other than Winterfox. And we are familiar with other hard-money lenders. If you look at the title report, the Abstract of Title of which I was given, it appears that they had already gone down the road with the hard-money lender. When I saw Utah Mortgage, they had already gone to a hard-money lender after their Notice of Default, and that loan was not even a two-month old loan before it was paid off with the Winterfox loan.

Having been in Utah for 25 years and working with these hard-money lenders, there are only a handful that would have even considered it and even less that would have even done it. I think the absolute best loan he could have gotten was the Winterfox loan. But, again, you have to balance the degree of risk with the rate that was associated with it, and there was an extreme amount of risk here. So the rate would have had to have been higher.

Q. Are 1.3 million loans easily sold on the secondary markets?

A. No, ma'am. Fanny and Freddie, the two GSEs in the secondary market, government-sponsored enterprises in the secondary market, at the end of every year put out what their loan limits will be for the coming years. In 2004 and 2005 Fanny and Freddie limits were at 322,700 and 333,700 for '04 and '05. Even now Fanny and Freddie limits don't even approach $1.3 million.

Q. And how does that impact the ability to sell the loan?

A. A traditional lender would not have been able to sell the loan, so this is called a portfolio loan, a loan that you would have to keep on the books and maintain for however long it took you to get the money back. And then you also have to balance the risks. Well, what if they don't pay me back as agreed, what if they take out bankruptcy, what if there's other problems, and that would also need to be balanced in that risk, risk rate scenario.

Q. So, Mr. Luna, based again on your review of the information and your experience, have you formed an opinion on -- on whether the terms and conditions of the Winterfox loan to Mr. Kitts in December of 2004, whether those terms were reasonable and competitive based upon the risks associated with the extension of credit?

A. The interest rate and points, in combination of both, were competitive and reasonable based on the risks associated with the extension of that loan, that credit.

Q. And can you explain how you've -- what you've based your opinion on or how you've come to that conclusion.

A. The limited number of individuals that could have qualified for that loan, the pool of individuals. We don't know the person that could have done it, so it's a limited pool. Generally speaking, someone would need to qualify with approximately a 30 percent debt-to-income ratio, so their income would have to be such to qualify for a $1.35 million loan. They would have to have shown ability such as on their credit report, credit scores. I don't remember exactly what the credit score ranges were in the -- in the '04 -- December of '04 period. They've certainly tightened up now. But back in those days, they were a little more relaxed. I would probably say in the 5 to 600 range, maybe.

And then there would have had to have been some distance from these bankruptcies and from the Notice of Default for a lender to consider these options. FHA, for example, on a Chapter 7, would be two years and one day. There were, again, sub-prime lenders that would take a shorter period of time, but the Notice of Default would have prevented a sub-prime lender from doing that while the Notice of Default was still open and pending.

Q. And so what would you expect the interest rate or the points to be for a loan of this -- of this size, $1.3 million, at the end of 2004 given the risks that --

A. It would -- it would --

Q. -- that you see presented with Mr. Kitts -- with Mr. Kitts' situation?

A. It would have been higher. It would have been higher. Exactly what would it have been? I've seen other lenders charge as much as, unfortunately, a hundred percent. It would just depend on the term and the rate and the risk.

If the risk was relatively sure, in other words, that the lender felt very likely that the individual could pay the loan back, I would assume a 12 to 15 percent range would have been appropriate.

In reviewing the documents, Mr. Kitts' bankruptcy paperwork, and not really even seeing income that could be documented to repay back the loan, the interest rate would have certainly been higher. It would have just been a guess, but it would be 40, 50 percent. It would have been extremely high due to the risk associated with this loan. If it could have even been done. Other lenders would have just walked away from it.

Q. What about the points for a loan like this? When you say interest, are you including the points as well?

A. I'm not. Points on top of that would be maybe another -- well, again, in the early 1980s we saw them as 15 points. So if you were -- if you were to suggest -- or if I were to suggest a point somewhere in the neighborhood of 2 to 15, it would have been appropriate for this kind of loan, this size of loan, the risks associated with this loan.

Q. And so based on that, do you -- as I understand it, your opinion is that the terms and conditions of the loan that Winterfox extended to Mr. Kitts were reasonable and competitive based upon the risks. Is that correct?

A. That is correct.

Q. You've been here. You heard Mr. Haertel's testimony. Correct?

A. I heard him today. I was not here previous. I was here previous; I did not hear Mr. Haertel's testimony.

Q. All right. If I told you that -- that he testified that Mr. Kitts could have gotten a hard-money loan in December of 2004 at 12 percent interest and 3 points, would you agree with that statement?

A. I would not.

Q. And why is that?

A. Again, knowing many of the hard-money lenders here in Utah, they probably would have passed. They would have probably chosen not to do this loan. And those that would do this loan -- frankly, I can't think of anybody that would have done this loan other than Winterfox. I'm surprised that they did the loan.

MS. BOULEY: Your Honor, may I just have a second?

THE COURT: All right.

MS. BOULEY: Thank you. No further questions at this time.

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CROSS EXAMINATION +

BY MR. AFFLECK:
Q. Good afternoon, Mr. Luna.
A. Afternoon, sir.
Q. Adam Affleck for Trustee. Ms. Bouley asked you if the -- about the materials that you reviewed in preparing your report, and you referenced your expert reports at Exhibit 522 and 523. Correct?
A. That is correct.
Q. And in Exhibit 522, beginning on page 3, is the information that you reviewed. Is that right?
A. That is correct.
MR. AFFLECK: Your Honor, I'd ask the Court to receive Exhibit 522, page 3 through page 5 to indicate -- put on evidence the items that Mr. Luna reviewed.
MS. BOULEY: No objection, Your Honor.
THE COURT: Received.+
MR. AFFLECK: And in Exhibit 523, that is your rebuttal report or response to Mr. Haertel's report, and I assume it's the same information -- you reviewed the same information for that report as was contained in your original report?
A. Yes, sir. That is correct.
Q. No further questions.
MS. BOULEY: Your Honor, we have no further questions for Mr. Luna.

THE COURT: I'm somewhat confused about whether or not Defendant's Exhibit 523 is in evidence or not in evidence.

MR. AFFLECK: I didn't offer -- I did not offer that into evidence, Your Honor, except to get the witness' testimony that his opinion was all based on the materials reviewed in document 522.

MS. BOULEY: And objection, Your Honor. That misstates his testimony. It was based on his materials as well as his 30 years in the mortgage lending industry.

MR. AFFLECK: Yes. As well as 30 years in the mortgage experience. We understand that.

THE COURT: All right. But 533's not received?

MR. AFFLECK: And 522 we just ask to receive the portions of that opinion which set forth the data reviewed.

THE COURT: All right. Do you have anything further with this witness?

MS. BOULEY: No, Your Honor.

THE COURT: Sir, you may step down.

THE WITNESS: Thank you.

MS. BOULEY: Okay, Your Honor. Winterfox calls Roger Cater.

THE COURT: Sir, would you come forward and be sworn, please.

(The witness is sworn.)

THE CLERK: Please take the witness stand, and state your name and spell it.

THE WITNESS: Roger Cater. R-o-g-e-r, C-a-t-e-r.

DIRECT EXAMINATION +

BY MS. BOULEY:

Q. Good afternoon, Mr. Cater.

A. Good afternoon.

Q. Mr. Cater, you have also been retained by Winterfox as an expert witness to provide opinions in this case. Is that correct?

A. Correct.

Q. Without telling the Court what opinions you're going to provide, could you please explain what issues you've been asked to address.

A. Yes. I've been asked to as to whether -- excuse me. What -- the abstract of all recorded documents in the official records of Summit County, State of Utah name here describing Brian Kitts and/or Sun Peak Holdings, the time period of April 19th, 1994 to February 9, 2009, showing that the parcel of property located at -- excuse me. I'm a little nervous -- approximately 2580 Bear Hollow Drive, also described as Lot 25, Lot 6, Cedar Draw Estates, and, also, what property Sun Peak Holdings owned in Wasatch and Summit Counties from the time period of January 2000 to February of 2009.

Q. Okay. Were you -- were you also asked to opine

about how that property is owned?
A. That's correct. I'm sorry. And whether any of the property is owned anything other than residential.
Q. Okay. Thank you. Could you please turn in your witness book to Exhibit 524.
Your Honor, may I approach to help him with that?
THE COURT: You may.
Q. (BY MS. BOULEY) Do you recognize -- do you recognize Exhibit 524?
A. Yes.
Q. And what is that?
A. It's the adversary proceeding.
Q. I'm sorry. Is -- it should be your expert report, Exhibit --
A. You said 524?
Q. Yes.
A. Oh. This is Defendant's. Is there . . .
Yes. Expert Witness Report of myself, Roger Cater.
Q. Okay. And could you just take a -- just look through the pages and make sure that's your report.
A. Yes.
Q. And is that your signature on the last page of the report?
A. Page 4, yes.

Q. And, Mr. Cater, could you briefly describe for the Court your formal credentials.
A. I'm a licensed title officer with over 15 years of experience. I'm currently employed with Coalitition Title My day-to-day activities are searching the public record in the various counties using the county indexes to search those properties, whether it's Summit, Wasatch, Salt Lake, any of the various properties or, excuse me, counties. I also have experience with residential, commercial, mining and water.
Q. Searching for those types of documents?
A. Yes.
Q. Or documents, I suppose, that reference those types of --
A. Recorded documents, uh-huh. That's correct.
Q. -- those types of properties? Okay.
And what is your position with Coalition?
A. I'm a title officer.
Q. And, again, you've held that position since --
A. For --
Q. -- when?
A. 15 years. Since '94, I believe.
Q. '94? Okay. And, Mr. Cater, what did you review to form your opinions in this case?
A. I reviewed the public records from Summit and

Wasatch Counties, their indexes regarding the properties, the lots.

Q. Okay. And do you recall approximately how many hours you spent reviewing and considering this information?

A. It was approximately about six.

Q. And, Mr. Cater, what else besides the materials that you just -- or the information that you just described, in terms of what you reviewed, are you relying on for the opinions you're prepared to render in this case?

A. I used the -- excuse me. Just a minute.

Q. What did you do to determine the zoning issues that you were asked to address?

A. The Park City zoning map and the Wasatch County. Or excuse me. Heber City zoning map.

Q. And so, Mr. Cater, based upon your review of the information that you've outlined in your report, and as you've explained here today, have you formed an opinion about what the abstract of all recorded documents in the official records of the Summit County Recorder in Utah naming or describing Brian Kitts and/or Sun Peak Holdings, Inc. for the time period of April 19th, '94, to January 2006 shows for the real property located at approximately 2580 Bear Hollow Drive in Park City?

A. Yes. I determined that Brian Kitts and Sun Peak Holdings have both held title at various times to said lot

25, also known as 2580 Bear Hollow Drive, during that time period.

Q. Okay. And could you please turn to Exhibit 525.

A. Okay.

Q. Do you recognize Exhibit 525 as Exhibit A to your report?

A. I do.

Q. Okay. What -- what is Exhibit 525?

A. It is a printout of the abstract of lot 25.

Q. And did you prepare it?

A. I did.

Q. And how did you go about preparing it?

A. Using the county records of the index for Cedar Draw Estates where I found lot 25.

Q. And what does -- what does Exhibit 525 show in terms of Sun Peak's or Mr. Kitts' interest in lot 25 over the -- over the time period that you mentioned?

MR. AFFLECK: Objection --

THE WITNESS: It shows --

MR. AFFLECK: -- to the extent the witness is testifying about what Mr. Kitts' interest is. He can testify about what the documents say, because that's what he reviewed.

THE COURT: Sustained.

Q. (BY MS. BOULEY) What -- what do the recorded documents reflect in terms of Sun Peak or Mr. Kitts' interest in the property?

A. It reflects the history of the documents from that time period, whether they're title or mortgage or liens or anything other than -- anything else related to title.

Q. And did you also look at the -- the underlying documents that -- that are reflected or described in this abstract, the actual recorded documents?

A. I reviewed them, yes.

Q. Okay.

Your Honor, at this time I'd like to move to admit Exhibit 525 into evidence.

MR. AFFLECK: Your Honor, this appears to be a summary, and I assume that it's being offered under Rule 1006. There is much of this report that -- or much of this summary that I just can't understand at all. I don't know what it means. And I would object on the basis that I just don't know what this means yet.

As far as the documents, it looks like the first few pages might be something like a chain of title, but I'm not sure yet, and I'm not sure if the documents that are included in this chain of title are documents that have been provided to us and that are admissible in evidence. To the extent that they are, we have no objection to a summary of all of the documents that have come in. I'm just not sure what this is and what the last 20 or 30 pages of this document is.

THE COURT: Would you lay an additional foundation, Counsel. I take this with some humor, with the objection that was filed, that all the lawyers in the room ought to be able to read an abstract like this, so it's -- it warms my heart to know that Mr. Affleck doesn't know what it says.

MR. AFFLECK: I've never -- I've never professed to be the smartest attorney in this city, Your Honor.

THE COURT: All right. Counsel, can you lay a better foundation.

MS. BOULEY: Certainly, Your Honor.

Q. All right, Mr. Cater. Could you please walk us through Exhibit 525 and tell us what we're looking at.

A. Yes. This is the abstract of all the documents recorded from that time period regarding lot 25.

Q. All right. And so what do we see on the first page here. We have CDE-1, CDE-2. What are all these references to CDE --

A. Those are the lots --

Q. -- the numbers down the side?

A. -- in that subdivision.

Q. Okay. And why are all of the lots appearing on this abstract?

A. Well, due to the nature of an abstract you have to go through the whole subdivision, and some documents, for instance, like this plat, some CC&R documents, assignments of easements, easements, they affect much more than just the lot, and you cannot just reduce it to the lot.

Q. Okay. So as I understand it, some of the documents that are included in this abstract affect many, many lots?

A. Correct.

Q. Not just lot 25?

A. Correct.

Q. But there's no way to excise the document --

A. Right.

Q. -- so that it only applies to lot 25 because, by its very nature, it applies to a whole group of them. Is that correct?

A. Correct. And I might add, due to the nature of the county's computer system, you can't really filter all of that out.

Q. Okay. Now, in connection with Exhibit 525, did you filter anything out of it or does this represent everything that --

A. It represents everything.

Q. So this is everything that's been recorded against lot 25 during the relevant -- the time period that you were asked to look at --

A. Correct.
Q. -- is that correct?
A. That's correct.
Q. So could you please turn to page 4. Starting at -- starting at page 4, and it goes on for quite -- quite a few pages. See if I can get to the end of it. We have just numbers. Looking at -- I'm up to page 18. We just have a column of numbers running down the left-hand side of the page.
A. Those are tax I.D. numbers.
Q. Okay.
A. For the appropriate properties.
Q. And so why are they listed like this in a column? What document or -- or recording is this -- is this big column of numbers related to?
A. This appears to be a broader document that appears to assign water rights from Silver Springs Water Company to Mountain Regional. So it goes beyond the boundaries of a subdivision, more or less, to that general area.
Q. And it's included in this abstract because it also affects lot 25. Is that correct?
A. That's correct. And I cannot limit what it prints out.
MS. BOULEY: Your Honor, I don't know if that a sufficient explanation of what this document contains. I'm

happy to, you know, have Mr. Cater educate us further on what it -- what it sets forth, but I'd ask again to let this document be -- be admitted into evidence. All of the -- I think all of the relevant or the deeds that are pertinent for -- for this case have been admitted into evidence, and they are reflected on this abstract. But I've not attempted to put all of the deeds that are on this abstract into evidence, because this does go back to '94 and Mr. Kitts didn't even acquire the Bear Hollow property until 1998.

THE COURT: Is there anything further regarding this document?

MR. AFFLECK: Are you asking me, Your Honor?

THE COURT: I'm asking if there are any objections.

MR. AFFLECK: The only objection we would have, Your Honor, is to the extent this appears just to be a summary of the documents that already have been received into Court, some of which -- probably most of which have been received relating to this property, we have no objection to the summary to the extent it merely summarizes the documents that have already been received by this Court.

To the extent it is -- it is dealing with documents that haven't been received, I'm not sure if it's relevant, and I would make that objection on relevance grounds. In addition, Your Honor, the summary, to the extent it is not based on documents admissible in Court, should not be received.

THE COURT: All right. Thank you. I'm going to overrule the objection. Exhibit 525+ will be received.

MS. BOULEY: Thank you, Your Honor.

Q. Okay. Mr. Cater, based on -- based again upon your review of the information that you've been over today and outlined in your report, have you formed an opinion on what property Sun Peak Holdings, Inc. has owned of record in Wasatch County and Summit County in the State of Utah for the time period of January 2000 to January 2006, and whether any of the property was zoned anything other than residential?

A. Yes, I have. They also own lot 24, block 6, Cedar Draw Estates, which is adjacent to lot 25. They own Units B4 and B5 Airport Business Commons. That's in Wasatch County. And -- excuse me. Lot 24 was in Summit County. They also own in Summit County lot 17B, Re-subdivision of lots 17A, 17B and 18A of Prospector Square.

Q. Okay. And did you have an opportunity to determine whether the Airport Business Commons, how that was zoned back in 2004?

A. It was zoned industrial.

Q. And how about Prospector Square? How was it zoned in December 2004?

A. General commercial.

Q. All right. And could I please tell you to take a look at Exhibit 550.
A. Yes.
Q. And what does Exhibit 550 show?
A. 550 is a printout of the history of the documents on -- based on lot 24.
Q. Okay. And does this -- and does this only -- did you prepare this?
A. I did, yes.
Q. Okay. And does this only show the chain of title for lot 24 for this time period?
A. Yes. On line 25 where it was a full abstract, I can filter this down just to conveyance documents.
MR. AFFLECK: This one I can understand, and the Trustee has no objection.
THE COURT: Exhibit 550+ is received.
MS. BOULEY: Thank you, Your Honor.
Q. Okay. Could you please take a look at Exhibit 555.
A. Yes.
Q. Okay. Do you recognize Exhibit 555?
A. I do.
Q. And what is it? Well, first of all, let me ask you: Did you prepare it?
A. I did.

Q. Okay. And what is it?

A. It's an abstract of units B4 and B5 Airport Common -- Airport Business Commons in Wasatch County.

Q. Okay. And does -- does this one include just the chain of title or does it include other documents as well?

A. No. It includes other documents.

Q. Okay. And why -- why does it include other documents?

A. They have no filter.

Q. Okay. And so -- so it was impossible to -- to only list chain of title you had to include everything else as well?

A. Correct.

Q. Is that correct?

A. Uh-huh.

MS. BOULEY: Your Honor, we'd move to admit Exhibit 555 into evidence.

MR. AFFLECK: This one is a little more difficult for me, Your Honor, because it appears to be a summary of a lot of documents that I haven't seen and that have not been made available to me. To the extent the summary deals with -- references documents that we've seen, I have no objection. But as to the rest of those documents, and generally when we're talking about Sun Peak Holdings property that is not the property at issue in this trial, I don't see the relevance of it, and I would object on relevance grounds.

And to the extent this summary is not dealing with documents that have been provided to the Trustee, to the extent it supports a summary, I would object on that basis. However, I don't object to the chain of title -- the parts of this summary that show the chain of title to the extent it is helpful to the Court.

THE COURT: Exhibit 555+ is received.

MS. BOULEY: Thank you, Your Honor.

Q. Would you please turn to Exhibit 561.

A. Okay.

Q. All right. Do you recognize Exhibit 561?

A. I do.

Q. Okay. Is it something you prepared?

A. I did.

Q. What is it?

A. It's an abstract of the documents regarding 17 -- lot 17B, Re-subdivision of lot 17A, 17B and 18A of Prospector Square.

MR. AFFLECK: The Trustee has no objection except as to relevance.

THE COURT: Exhibit 561+ is received.

MS. BOULEY: Thank you, Your Honor. And I have no further questions for Mr. Cater at this time.

THE COURT: Mr. Affleck.

CROSS EXAMINATION +

BY MR. AFFLECK:

Q. Good afternoon, Mr. Cater.

A. Good afternoon.

Q. You testified in your testimony about the property at 25 Bear Hollow Drive, that it was held in Sun Peak and in Brian Kitts. Correct?

A. That's correct.

Q. That was also held in Laurie Kitts' name individually and Brian and Laurie -- Brian and Laurie together. Right?

A. That's correct.

MR. AFFLECK: No further questions.

MS. BOULEY: No further questions, Your Honor.

THE COURT: Sir, you may step down.

THE WITNESS: Thank you.

MR. JUBBER: Your Honor, when Mr. Bird was on the stand a few -- earlier this afternoon, we read from portions of his deposition. Pursuant to Rule 32, I would ask that those portions that were read at that time be considered substantive evidence and not solely for impeachment. Alternatively, I would ask to recall Mr. Bird.

MR. AFFLECK: We have no objection to the Court taking his deposition as, the parts that were read in, as evidence.

THE COURT: All right.

MR. JUBBER: Thank you, Your Honor.
THE COURT: Is there a desire to cross examine?
MR. AFFLECK: No, there isn't.
THE COURT: All right.
MR. JUBBER: May we have a brief recess, Your Honor?
THE COURT: All right. We'll be in recess.
(Recess taken from 3:02 p.m. to 3:29 p.m.)
THE COURT: Counsel, do you have other witnesses?
MS. BOULEY: Your Honor, we don't have -- we may -- I don't think we have any more witnesses, but there's one exhibit that I'm not sure has been admitted. I understood that Exhibit 551 had been admitted into evidence, but apparently it hasn't been, so I'd like to move to have Exhibit 551 admitted into evidence. It is a warranty deed from Richard Grant to Sun Peak Holdings on June 9th of 2000. So this is the --
MR. AFFLECK: No objection.
THE COURT: All right. Exhibit 551+ is received.
MR. AFFLECK: And -- except as to relevance which I think has been overruled several times.
THE COURT: All right.
MS. BOULEY: Your Honor, the Defense rests.
THE COURT: All right. Do you have any rebuttal witnesses?
MR. AFFLECK: No, your Honor.

THE COURT: All right. Do you wish to argue then?

MR. AFFLECK: Yes.

THE COURT: All right.

MR. AFFLECK: Your Honor has already heard much of my closing argument, and so I don't want to belabor all of those points again unless the Court would very much like to hear that again.

THE COURT: We have a disk. I can replay it, Counsel.

MR. AFFLECK: I suppose if you want to hear it again, you can hear it on the disk. But I want to -- I'd like to add just a few points to the points that I had made that are interesting, and they're points that I forgot in my initial closing arguments. The -- what we looked at, or what I argued, there were several important facts that showed that this was a consumer loan. The loan was to an individual. It was his house. It was secured by a trust deed. He gave the trust deed because he had legal title to the property and so forth.

Winterfox has made much emphasis or put much emphasis on a Chapter 11 bankruptcy case that was filed by Sun Peak in October 2003. In that bankruptcy Mr. Kitts scheduled this property as property of Sun Peak. What they didn't emphasize was that Mr. Kitts also filed a personal Chapter 13 on the same day. And in that Chapter 13 case, he also listed the property as his personal asset.

What it shows, perhaps, is that Mr. Kitts is not an expert in -- on legal issues, title issues, if property is in the name of Sun Peak, does it belong to him. According to him, it does. According to Section 544(a), it might not. When we're looking at hypothetical rights or the rights of a hypothetical bonafide purchaser, there are issues that arise, but Sun Peak was a holding company.

The abstracts that you've seen that talk about Sun Peak's property in various areas, at the time this loan was given there were only two properties that were titled in Sun Peak's name. His house and the lot next door. And he has testified that the lot next door, in his view, is his own property, and that wasn't disclosed in his bankruptcy schedules. The Trustee has made a demand on Mr. Kitts for the sale proceeds from that property. We take it seriously, Trustee takes it seriously, and I think Mr. Kitts will as well.

The other point on the title to the property is that if title is so important, you have to look -- if title defines what the purpose of a loan is or is not, then you have to look at the title on the date that the Winterfox loan was obtained. Who had title to the property. Brian Kitts. In fact, if Brian Kitts did not have title to the property, Sun Peak would not have an enforce -- or I'm sorry -- Winterfox would not have an enforceable loan at all.

Now, as to the breakdown of the loans. Again, we would submit, the Trustee would submit, Your Honor, that that breakdown, what the loan was used for, all of the -- every single dollar of that loan, was it business, was it consumer purpose, that is really somewhat irrelevant in this case because the purpose of this loan was to save a home, to save a family dwelling. And if this Court agrees with the Anderson vs. Lester opinion and the Dawson case out of the bankruptcy court in Washington, DC, I think you're finished, because the undisputed evidence in this case is the reason he got this loan is he was in a panic. He was in a panic that he was about to lose it through the effects of three foreclosing liens.

Now, for creditors or for loans transactions when borrowers refinance their property, and if they refinance a property that is their residence, many times you get the lenders coming in and saying, gosh, TILA doesn't apply to this. Even though it was a loan to an individual, even though it was a loan secured by the individual's residence, we need to object to the application of TILA. And in those cases the Courts will look at the underlying purpose or the underlying uses of the law, and we have done that in this case for the Court. It has taken a lot of work, a lot of time to go through Mr. Kitts' own personal financial dealings that go -- the money goes through several accounts, and the Court has summaries for that showing where that money went and how it was used.

Mr. Millar is the Trustee's expert attorney on that issue, Your Honor, and I'd like, with the Court's permission, to allow Mr. Millar to show the Court a demonstrative exhibit that outlines and tracks the uses of this money. May I do so?

THE COURT: All right.

MR. MILLAR: Mr. Affleck mentioned a demonstrative, which I have here. May I approach the Bench, Your Honor?

THE COURT: You may. I wish I had the overhead on.

MR. MILLAR: What you see reflected as demonstrative 1-1 is a summary of the summaries which are found at Exhibit 72A, 73A and then at 74, 75A, 76A, 77 and Exhibit 78A. You'll also see that there are funds of $2200 that were not located, and so it cannot be ascertained as to how those proceeds were used.

Exhibit 72A and 73A at the top of that first page show how these -- the proceeds from the Washington Mutual loan, the $75,000 in cash, how those proceeds were used. You can see the breakout of the 4495 of fees which is an allocated prorata to Business or Unknown and Personal in a later chart. Then later, as you continue down, Exhibit 74 will show that Business or Unknown was 46,000, Personal 66,000, and then a number of fees associated with having that